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OFFICE OF
ADMINISTRATIVE HEARINGS

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STATE OF NORTH CAROLINA
COUNTY OF GRANVILLE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11-EDC-0703

Student by PARENT or GUARDIAN,)
Father)
)
Petitioner,)
)
vs.)
)
)
GRANVILLE COUNTY BOARD)
OF EDUCATION,)
)
Respondent.)

**FINAL DECISION
GRANTING MOTION FOR
SUMMARY JUDGMENT**

Respondent's Motion for Summary Judgment was heard before Chief Administrative Law Judge Julian Mann, III, in the Granville County Courthouse on Tuesday, May 3, 2011, pursuant to Rule 56 of the N.C. Rules of Civil Procedure and N.C. Gen. Stat. § 150B-36(d). After reviewing the record, pleadings, Respondent's motion with supporting affidavit, Respondent's amended motion with supporting affidavit, and Petitioners' documents in response thereto, and after hearing arguments of both counsel and Petitioner *Father*, the undersigned makes the following:

UNCONTROVERTED FINDINGS OF FACT

1. A Petition for a Contested Case Hearing was filed and accepted by the Office of Administrative Hearings on January 21, 2011, alleging Respondent failed or refused to allow Petitioners access to education records, tests, and reports; failed or refused to notify or provide information in regard to testing; failed or refused to schedule an IEP meeting; and failed to provide FAPE.

2. The Petitioner *Father* filed a request to have access to educational records by letter dated January 14, 2011. The requested records were copied and Petitioner *Father* was notified that he could retrieve the copies at the Granville County Schools Central Office.

3. Petitioner *Father* was afforded additional opportunities to inspect the educational and testing records by contacting school personnel to arrange a time for such review.

4. The Respondent arranged for an assisted technology evaluation for Petitioner *Student*. The speech therapist and occupational therapist had conducted their evaluations, and they were in the process of completing the written summaries at the time the petition was filed. The written summaries had not been submitted to Respondent at the time the petition was filled.

5. Petitioners' educational consultant stated that it was unnecessary to have an IEP meeting just to make a minor modification to Petitioner *Student's* BIP (Behavior Intervention Plan.)

6. Petitioners previously filed a Petition for a Due Process Hearing in 10 EDC 8864 regarding Respondent's alleged failure to follow Petitioner *Student's* BIP. This contested case, decided in Respondent's favor is incorporated herein by reference.

7. Services required in Petitioner *Student's* IEP and BIP are being implemented, FAPE provided, and Petitioners' educational consultant has been consulted in the implementation of services.

8. Petitioners have previously filed 10 EDC 5398 alleging that Respondent failed to schedule an IEP meeting, failed to provide FAPE, and failed to implement the IEP. All issues were summarily dismissed and these issues decided against Petitioners. 10EDC 5398 is incorporated herein by reference.

9. The issues herein are similar to or substantially the same as the issues involved in the Petitioners' previously filed contested case, 10 EDC 2914, which is incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individual Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq.*, and implementing regulations, 34 C.F.R., Part 300. All parties have been correctly designated and there is no question as to misjoinder or non-joinder. The parties received prior notice of the Respondent's Motion For Summary Judgment and appeared at the hearing. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, N.C. Gen Stat. § 150B-36(d) and 26 N.C.A.C. 03.0101 and 26 N.C.A.C. 03.0115, the undersigned has authority to grant summary judgment.

3. Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56. N.C.R. Civ. P. 56(c) (2008). Summary Judgment "is designed to eliminate the necessity of a formal trial where

only questions of law are involved.” *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001).

4. On a Motion for Summary Judgment, the Court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials, and the undersigned may also consider facts which are subject to judicial notice and any presumptions that would be available at trial. *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1985); *Gebb v. Gebb*, 67 N.C. App. 104, 107, 312 S.E.2d 691, 694 (1984).

5. “The moving party has the burden of establishing the lack of any triable issue of fact.” *Draughon v. Harnett County Bd. Of Educ.*, 158 N.C. App. 208, 580 S.E.2d 732 (2003). “The showing required for summary judgment may be accomplished by proving an essential element of the opposing party’s claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim.” *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). “When considering a motion for summary, the trial judge must view the presented evidence in a light most favorable to the non-moving party.” *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707. “Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E. 2d 660, 664 (2000). A party opposing a properly supported motion for summary judgment must present significant probative evidence to support the Petition, especially when the non-moving party bears the burden of proof. An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond according to law, Summary Judgment, if appropriate, shall be entered against him. N.C. R. Civ. P. 56(e).

6. Under IDEA, the burden of proof in an administrative hearing is properly placed on the party seeking relief. *Schaffer ex. Rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this contested case, Petitioners are the parties seeking relief and therefore bear the burden of proof for the remedies sought. Petitioners must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary defines "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." Respondent bears the burden of proof on their motion.

7. Respondent provided significant and substantial evidence that it gave Petitioner access to educational records, including tests or reports, provided information regarding testing, scheduled required IEP meetings and provided Petitioner *Student* FAPE. Petitioner *Father's* assertion of additional remedies or causes of action which are not part of the remedies sought by Petitioners in their original petition are disallowed. “The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint ...” 34 C.F.R. 300, 511(d).

8. Petitioners failed to respond as required by Rule 56(e) and did not set forth specific facts as required, showing that there is a genuine issue of material fact for trial. Assertions, pleadings and argument cannot satisfy Petitioners' burden to establish a genuine issue of fact.

9. Because Respondent met the threshold burden of showing no issue of fact, and Petitioners failed to counter with specific facts at issue, Summary Judgment is appropriate in this contested case.

10. Petitioners cannot re-litigate issues settled and adjudicated in the previously referenced due process hearings and those decisions are incorporated herein to supplement this contested case decision to grant summary judgment for Respondent and to bar or otherwise preclude issues that have been previously and finally adjudicated in these previous decisions

BASED UPON the foregoing Findings of Fact and Conclusion of Law, the undersigned makes the following Decision and Order:

DECISION

The undersigned Chief Administrative Law Judge finds and holds that there are no genuine issues as of any material fact and Respondent is entitled to judgment as a matter of law. Respondent's Motion for Summary Judgment is GRANTED. Therefore, the Undersigned finds that Respondent's IEP and placement of Petitioner *Student* was appropriate to address Petitioner *Student's* needs so as to provide him with FAPE in the least restrictive educational environment. The Petitioners are not entitled to nor are they granted any other relief.

NOTICE

In order to appeal this final decision, the party seeking review must file a written notice of appeal with the Director of the Exceptional Children's Division, North Carolina Department of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the parties' receipt of notice of the decision. North Carolina Procedures Governing Programs and Services for Children with Disabilities § .1512J(2).

IT IS SO ORDERED.

This is the _____ day of May, 2011.

Julian Mann, III
Chief Administrative Law Judge